

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA)
)
 v.)
)
 LEE BOYD MALVO,)
 a/k/a JOHN LEE MALVO)
)
 Defendant.)
)
 CBS BROADCASTING INC.,)
)
 Movant.)
 _____)

CASE NOS. CR03-3089, CR03-3090, CR03-3091

**MOTION TO INTERVENE AND FOR ORDER
REGARDING RELEASE OF TAPES ADMITTED IN EVIDENCE**

FILED IN CLERK'S OFFICE
2001 FEB 13 P 2:54
TAMARA H. MITCHELL, CLERK

CBS Broadcasting Inc. ("CBS"), by its undersigned counsel, respectfully moves to intervene in this case for the limited purpose of seeking (1) access to and the opportunity to obtain copies of all audio and videotapes admitted in evidence in the trial of this matter that are presently in this Court's files, or (2), to the extent that some or all of such tapes have been released by the Court to third parties, CBS alternatively seeks an Order from the Court authorizing the release by those third parties of copies of any such tapes now in the third parties' possession. CBS further moves for the opportunity to be heard on this motion, which, as more fully set forth in the accompanying memorandum of law, is premised on the public's presumptive rights of access to court records under the First Amendment and the common law.

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Dated: February 13, 2004

By:

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Counsel for CBS Broadcasting Inc.

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FILED IN CLERK'S OFFICE
2004 FEB 13 PM 2:51
FRANCIS W. MITCHELL, CLERK

NOTICE OF MOTION

PLEASE TAKE NOTICE that at the Court's earliest convenience, CBS Broadcasting Inc. will present to the Court the attached Motion to Intervene and for Order Regarding Release of Tapes Admitted in Evidence.

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Dated: February 13, 2004

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Counsel for CBS Broadcasting Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2004, I caused true and correct copies of the foregoing Notice of Motion and the accompanying Motion to Intervene and for Order Regarding Release of Tapes Admitted in Evidence, Memorandum in Support of Motion to Intervene and for Order Regarding Release of Tapes Admitted in Evidence, and a Proposed Order to be served by first-class mail on:

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FILED IN CLERK'S OFFICE
2004 FEB 13 P 2 PM
FALLS CHURCH, VA

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AND FOR ORDER
REGARDING RELEASE OF TAPES ADMITTED IN EVIDENCE**

CBS Broadcasting Inc. ("CBS"), by its undersigned counsel, respectfully submits this memorandum in support of its Motion to Intervene and for Order Regarding Release of Tapes Admitted in Evidence.

INTRODUCTION AND BACKGROUND

On December 23, 2003, a jury found defendant Lee Boyd Malvo, a/k/a John Lee Malvo, guilty of capital murder and of using a firearm in the commission of a felony in connection with the October 14, 2002 killing of FBI Analyst Linda Franklin in Falls Church, Virginia. The Malvo trial captured the attention of the nation, as Mr. Malvo, and an alleged co-conspirator, John Muhammad, are suspected of being responsible for and have been charged with multiple homicides in Maryland and other jurisdictions that have come to be known collectively as the "DC sniper shootings."

During the Malvo trial, the Commonwealth played in open court and the Court admitted in evidence certain audio and/or videotapes (the “tapes”), including, for example, recordings of conversations between Mr. Malvo and detectives of the Fairfax County Police Department recorded while Mr. Malvo was in police custody. *See, e.g.,* Com. Ex. 220a.¹ Copies of the documentary exhibits, including transcripts of *some* of the tapes, were posted on the Court’s web site, which is accessible to the public. Insofar as publicly available records reveal, however, transcriptions of certain of the audiotapes were not admitted in evidence or otherwise made available to the public except at the time the tapes were offered in evidence. *Compare* Website of the Circuit Court of Fairfax County (listing exhibits made available to public through website, including certain transcripts of tapes) *with* 12/30/03 Order (Roush, J.) (directing release of tapes to Sniper Task Force, including tapes not among exhibits available through website).

CBS News, including *60 Minutes II*, a weekly primetime television newsmagazine program, has regularly reported to the public about the Malvo trial and the issues of significant public concern it presents. CBS intends to and will continue to report to the public on the various judicial proceedings arising out of the shootings, including the remaining phases of this particular prosecution.² In connection with its reporting, CBS has requested access to and copies of the tapes from those parties known to be in possession of them, including the Sniper Task Force. An agent of the Sniper Task Force has advised CBS that it believes that this Court does

¹ Those portions of the Court’s records readily available to the public confirm that the Court admitted in evidence numerous audiotapes offered by the Commonwealth. CBS has to date been unable to determine with certainty whether videotapes were admitted in evidence or whether any tapes offered by the defense were admitted in evidence. This motion seeks access to all tapes admitted in evidence during the trial.

² Although CBS believes that the Court properly may take judicial notice of the news reporting activities in question, to the extent the Court believes these facts must be established by affidavit or testimony at a hearing, CBS is prepared to do so.

or would object to the Task Force making copies of the tapes in its possession available to the public. Consequently, CBS is constrained to seek relief through this motion; specifically, access to and copies of such tapes as may remain in the Court's possession, and an order from the Court authorizing third parties to release copies of tapes in their possession.³

ARGUMENT

I. THE FIRST AMENDMENT AND THE COMMON LAW AFFORD A PRESUMPTIVE RIGHT OF ACCESS TO THE TAPES AND TO MAKE COPIES THEREOF

The First Amendment affords the public and the press a presumptive right of access to judicial proceedings in criminal cases, and this right extends as well to the record of such proceedings. *See, e.g., Richmond Newspapers, Inc. v. Com.*, 222 Va. 574, 588, 281 S.E.2d 915, 922-23 (1981) (recognizing First Amendment right of access to pretrial hearings and ordering trial court to release to media intervenors all recordings and transcriptions of previously closed pretrial hearings). As the U.S. Supreme Court has explained:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

³ As the Virginia Supreme Court has recognized, intervention is the appropriate vehicle for news organizations and other members of the public to vindicate their access rights in the context of criminal proceedings. *See, e.g., Hertz v. Times-World Corp.*, 259 Va. 599, 609, 528 S.E.2d 458, 463-64 (2000); *Richmond Newspapers, Inc. v. Com.*, 222 Va. 574, 590, 281 S.E.2d 915, 923-24 (1981); *see also In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *In re Knight Publ'g Co.*, 743 F.2d 231 (4th Cir. 1984). And, as the U.S. Supreme Court and the federal Court of Appeals both have emphasized, a news organization moving to intervene in these circumstances must be afforded a prompt and full hearing on such a motion. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (media and public “must be given an opportunity to be heard” on questions relating to access) (citation omitted); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988) (same).

Press Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984). Closed proceedings and records, in contrast, inhibit the “crucial prophylactic aspects of the administration of justice” and lead to distrust of the judicial system if, for example, the outcome is unexpected and the reasons for it are hidden from public view. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). Indeed, this Court itself has expressly adhered to these principles in this action. See 04/29/03 Order (Roush, J.) (“The presumption will be that all items filed with the court will be open to the public and counsel shall have a high burden to seal any matter.”).

The public’s First Amendment-based right of access to a judicial proceeding or portion of the record it generates may be overcome only where the court finds “a compelling government interest” and where the remedy afforded is “narrowly tailored to serve that interest.” *In re Times-World Corp.*, 25 Va. App. 405, 415-16, 488 S.E.2d 677, 682 (1997) (citations and quotation marks omitted); see also *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (same). Put differently, access to judicial proceedings and the record therein may be prohibited consistent with the First Amendment “only if (1) closure [or sealing] serves a compelling interest; (2) there is a ‘substantial probability’ that, in the absence of closure [or sealing], that compelling interest would be harmed; and (3) there are no alternatives to closure [or sealing] that would adequately protect that compelling interest.” *In re Washington Post Co.*, 807 F.2d 383, 392 & n.9 (4th Cir. 1986) (applying standards for closure of courtroom to requests for sealing or unsealing documents in record). “Moreover, the court may not base its decision on conclusory assertions alone, but must make specific factual findings.” *Id.* at 392 (citations omitted). The courts of this Commonwealth have likewise held that only overriding interests such as the need to preserve a defendant’s right to a fair trial are sufficient to outweigh the presumption of access, and even then, that the trial court must consider alternatives to closure or

sealing. *See, e.g., Richmond Newspapers*, 222 Va. at 589, 281 S.E.2d at 923. In this case, because the tapes sought by CBS have been either played to the jury in open court and/or admitted in evidence, there is no possibility, much less a substantial probability that further disclosure of the tapes would jeopardize the rights of this defendant – or any other – in any way. Accordingly, there is no overriding interest implicated that would be sufficient to overcome the public’s and the press’ First Amendment right of access to the tapes.

By the same token, a common law presumption of access attaches to all trial exhibits and records, and this includes the right of the public to make copies of those exhibits and records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing common law right “to inspect and *copy* public records and documents, including judicial records”) (footnote omitted) (emphasis added); *In re Nat’l Broad. Co.*, 653 F.2d 609, 612-13 (D.C. Cir. 1981) (public’s “common law right to inspect and *copy* judicial records is indisputable” and both ““precious”” and ““fundamental””) (citations omitted) (emphasis added); *In re Nat’l Broad. Co.*, 635 F.2d 945, 949 (2d Cir. 1980) (“common law right to inspect and *copy* judicial records is beyond dispute”) (emphasis added).

Moreover, it is well established that the public’s common law right to inspect and copy judicial records extends to trial exhibits such as the tapes at issue here. *In re American Broad. Cos.*, 537 F. Supp. 1168, 1170 n.4 (D.D.C. 1982) (“it is now settled that the right extends to records which are not in written form, for example, videotapes”); *see also, e.g., In re Nat’l Broad. Co.*, 653 F.2d at 612 (right to inspect and copy judicial records extends to “audio and video tapes”) (footnotes omitted); *United States v. Mitchell*, 551 F.2d 1252, 1258 & n.21 (D.C. Cir. 1976) (recognizing common law right of public to copy those of President Nixon’s audio recordings played at criminal trial of his associates), *rev’d on other grounds sub nom. Nixon v.*

Warner Communications, 435 U.S. 589 (1978); *United States v. Guzzino*, 766 F.2d 302, 303-04 (7th Cir. 1985) (reversing as abuse of discretion trial judge's refusal to permit media intervenors to copy audiotapes admitted in evidence at trial); *United States v. Criden*, 648 F.2d 814, 829-30 (3d Cir. 1981) (reversing district court's order denying media intervenors' application to copy video and audio tapes admitted into evidence and played in open court); *In re Nat'l Broad. Co.*, 635 F.2d at 948-52 (affirming district court's order enforcing media intervenors' common law right to copy, on a daily basis, videotapes admitted into evidence during trial).⁴

While the public's common law right of access, like the First Amendment-based right, is not absolute, the right to inspect and copy may be denied

only if the [trial] court, after considering 'the relevant facts and circumstances of the particular case', and after 'weighing the interests advanced by the parties in light of the public interest and the duty of the courts', concludes that 'justice so requires'. The court's discretion must 'clearly be informed by this country's strong tradition of access to judicial proceedings'. In balancing the competing interests, the court must also give appropriate weight and consideration to the 'presumption – however gauged – in favor of public access to judicial records.'

In re Nat'l Broad. Co., 653 F.2d at 613 (footnotes omitted). Indeed, the federal Court of Appeals has observed that the common law presumption of access can be rebutted only "if countervailing interests *heavily* outweigh the public interests in access." *Rushford*, 846 F.2d at 253 (emphasis added). "The party seeking to overcome the presumption bears the burden of showing some *significant* interest that outweighs the presumption." *Id.* (emphasis added).

⁴ It is immaterial whether all of the tapes admitted in evidence actually were played in open court, or whether certain portions of the tapes played were not, as a technical matter, admitted in evidence. The presumptive right of access applies to "everything in the record, including items not admitted into evidence." *Smith v. United States District Court*, 956 F.2d 647, 650 (7th Cir. 1992) (citing *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984)); see also *In re CBS, Inc.*, 540 F. Supp. 769, 771 n.3 (N.D. Ill. 1982) (fact that tape recordings sought were not admitted into evidence does not mean tapes were not "judicial records" that played role in outcome of trial).

In *In re Nat'l Broad. Co.*, the federal appeals court reversed the district court's order denying certain media intervenors' application to inspect and copy videotapes introduced during a criminal prosecution. The Court of Appeals noted five factors that a lower court should weigh when considering whether to grant such an application, and those factors are instructive here:

First, the fact that the tapes were admitted into evidence and played to the jury weighs heavily in favor of the application. As we have previously observed, "the general rule is that '[a] trial is a public event,' and '[w]hat transpires in the court room is public property.'"

653 F.2d at 614 (footnote omitted). CBS understands that the tapes in question were both played for the jury and admitted in evidence. Accordingly, this factor weighs heavily in favor of CBS's application to obtain copies the tapes.

Second, the tapes had been seen and heard by those members of the press and public who attended the trial. Our cases have recognized that such previous access is a factor which lends support to subsequent access.

Id. (footnote omitted); *see also, e.g., In re Nat'l Broad. Co.*, 635 F.2d at 952 (once evidence becomes known to public through presentation at public session of court, "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction") (footnote omitted). The tapes that CBS seeks to copy were heard by the public attending the Malvo trial as they were played in open court, and transcripts of some or all of them subsequently were made available to the public *worldwide* through the Court's website. This factor, too, weighs heavily in favor of CBS's application.⁵

⁵ CBS has been informed that the Court may previously have informally rejected an informal request to copy audiotapes admitted in evidence based in part on the Court's concerns about maintaining the physical integrity of the original tapes. CBS stands ready to work with Court personnel (or, to the extent all the tapes are now in the hands of third parties, those third

Third, the tapes contain only admissible evidence, were introduced for the purpose of proving [the matter at issue], and were obviously relied upon by the jury Thus, releasing the tapes will promote the integrity of the judicial process, for such will open at least part of the proceedings to those members of the public who could not attend the trial

In re Nat'l Broad. Co., 653 F.2d at 614; *see also, e.g. Criden*, 648 F.2d at 822 (“the value of public supervision and inspection of courtroom proceedings, and the public’s interest in learning of important matters . . . favor broad dissemination of the actual evidence introduced in judicial proceedings” and such values “can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person”). The tapes admitted in evidence in this proceeding necessarily contain only admissible evidence (or, at the least, none determined by the Court to be inadmissible), and there can be no question that the jury relied upon them in rendering its verdict. Thus, release of the tapes would substantially “promote the integrity of the judicial process.” *In re Nat'l Broad. Co.*, 653 F.2d at 614. Indeed, this Court appears to have concluded as much by making the contents of at least certain of the tapes available to the public on its website.⁶

parties) to duplicate the tapes in a manner that minimizes any threat to the integrity of the tapes. Indeed, where, as here, there are adequate, commonly used methods for copying the tapes without risk to their integrity, the need to safeguard their integrity does not approach the extraordinary circumstances necessary to overcome the presumptive right of access. *See Valley Broad. Co. v. United States District Court*, 798 F.2d 1289, 1295 (9th Cir. 1986).

⁶ The transcripts are not, however, an adequate substitute for access to the tape recordings themselves. *See, e.g., In re Nat'l Broad. Co.*, 635 F.2d at 952 (“Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence”); *Criden*, 648 F.2d at 824 (“There can be no question that actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by second-hand reports.”).

Fourth, the nature of the trial itself is a factor which provides strong support for the application. As noted above, this case involves issues of major public importance

Id. The public interest in these particular proceedings can hardly be overstated. The murder at issue is suspected of being part of a horrific crime spree that both captured the attention of the nation and dramatically affected the lives of the citizens of this region. Indeed, the existence and scale of the Sniper Task Force itself demonstrates the public importance of Mr. Malvo's prosecution to the public and law enforcement agencies around the country.

Finally, the tapes sought are fully encompassed by the presumption in favor of access to judicial records.

Id. The tapes in question, as material admitted in evidence, fall conclusively within the category of "judicial records." Indeed, as one court observed in connection with certain media intervenors' application to inspect and copy audio recordings of a telephone conversation between actress Jodie Foster and presidential assailant John W. Hinckley, the public's right of access is entitled to particular weight where the tape recorded exhibit constitutes "real evidence" of the matters at issue in the trial proceeding. *In re American Broad. Cos.*, 537 F. Supp. at 1173.

Put simply, in the circumstances of this case, neither the Commonwealth nor the defendant can offer any basis for overcoming the public's First Amendment and common law rights to inspect and copy the tapes, and CBS therefore respectfully requests that the Court grant this motion and make such tapes as remain in its possession available for copying.

II. TO THE EXTENT THE COURT HAS RELEASED THE TAPES TO THIRD PARTIES, THE COURT SHOULD ISSUE AN ORDER AUTHORIZING THE THIRD PARTIES TO RELEASE COPIES OF THE TAPES

As the foregoing establishes, the public has both a First Amendment and common law right to inspect and copy the tapes. *E.g., Richmond Newspapers*, 222 Va. at 588, 281 S.E.2d at 922-23 (ordering trial court to release to media intervenors all recordings and transcriptions of

previously closed pretrial hearings). The record indicates, however, that the Court has released at least some of the tapes to the Sniper Task Force, which apparently believes that this Court would object to it releasing copies of the tapes to the public. CBS respectfully submits that the First Amendment and common law both empower and oblige the Court to authorize the third parties in question to release copies of the tapes to the public. Elsewise, the public's presumptive rights of access could be defeated in every case by the expedience of trial courts divesting themselves of possession of the record at the conclusion of every proceeding. This surely is not the law.

CONCLUSION

For the foregoing reasons, CBS respectfully requests that the Court grant its motion and (1) provide access to and copies of such tapes as remain in the Court's possession and (2) enter an order authorizing third parties in possession of the tapes to release copies to the public. CBS further requests the opportunity to be heard in connection with this motion.

February 13, 2004

Respectfully submitted,

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